

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

ROSALIO TAPIA DBA TAPIA EXPRESS,

Respondent.

**Docket No. FMCSA-2009-0374¹
(Western Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

On October 21, 2009, the California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Rosalio Tapia dba Tapia Express (Respondent).² The NOC, based on an October 5, 2009 compliance review, charged Respondent with three violations of the Federal Motor Carrier Safety Regulations: (1) one violation of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substances test result, with a proposed civil penalty of \$1,790; and (2) two violations of 49 CFR 395.8(k)(1), failing to preserve driver's records of duty status for 6 months, with a proposed civil penalty of \$820 per count. The NOC proposed a total civil penalty of \$3,430 for the three violations.

¹ The prior case number was CA-2010-0021-US0963.

² See Exhibit 1 to Field Administrator's Answer and Opposition to Petition for Reconsideration Pursuant to 49 CFR 386.64 and Memorandum of Law in Support (Claimant's Answer to Petition).

After Respondent failed to respond to the NOC, the Field Administrator for the FMCSA's Western Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on November 30, 2009.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective December 7, 2009, with the civil penalty immediately due and payable on that date.

On December 2, 2009, Respondent served on Claimant what appears to be his response to the NOC.⁴ Respondent admitted the violations, promised to keep a closer check on one of the drivers cited in the NOC, and promised to place this driver in its drug and alcohol testing program.⁵ Respondent requested a reduction in the proposed penalty because he was already paying off another civil penalty.

In his Answer to the Petition served January 4, 2010, Claimant requested that the petition be denied because Respondent defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

2. Decision

Because Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), he defaulted.⁶ Under 49 CFR 386.64(b), a

³ See Exhibit 3 to Claimant's Answer to Petition.

⁴ See Exhibit 5 to Claimant's Answer to Petition. Claimant treated this response as a Petition for Reconsideration of the NDFAO, although the response does not reference the NDFAO.

⁵ Assuming that the "closer check" relates to record of duty status violations, the driver in question, Walter E. Molina, was actually only cited for the § 382.301(a) violation. A different driver was cited for the § 395.8(k)(1) violations.

⁶ The NOC reply deadline was November 25, 2009. This date was calculated by adding 30 days to the October 21, 2009 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent failed to meet his burden of demonstrating that the Final Agency Order should be vacated. Claimant established that Federal Express delivered the NOC to Respondent on October 23, 2009.⁷ However, Respondent did not offer any explanation for failing to meet the filing deadline. Therefore, he did not demonstrate that his failure to timely reply to the NOC was due to excusable neglect. Moreover, Respondent admitted the violations and promised to take corrective action. As Claimant points out, the term “meritorious defense” in § 386.64 does not apply to requests to reduce a civil penalty where the Respondent does not contest the substantive violations set forth in the NOC.⁸

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Even if, for the sake of argument, Respondent acted with due diligence in belatedly filing a response to the NOC, it would be an empty exercise or futile gesture to vacate the Final Agency Order because he did not demonstrate a meritorious defense.⁹

⁷ See Exhibit 2 to Claimant’s Answer to Petition.

⁸ See *In the Matter of Curtis R. Lunney dba L & F Transport*, Docket No. FMCSA-2007-28487, Order Denying Petition for Reconsideration, May 5, 2009, at 3.

⁹ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$3,430 is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

It Is So Ordered.



Rose A. McMurray

Assistant Administrator
Federal Motor Carrier Safety Administration

9. 3. 10
Date

CERTIFICATE OF SERVICE

This is to certify that on this 7 day of September, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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